

# Intimidation through Litigation

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Last week, legal proceedings were initiated against a Polish writer as well as a couple of high school students for allegedly insulting Polish President Andrzej Duda. These proceedings are just the latest examples of how Polish authorities or their allies attempt to intimidate and silence critics by means of litigation.

## “Andrzej Duda is a moron”

This is how writer Jakub #ulczyk [commented on](#) President Duda’s actions in the field of foreign policy (in the context of the lack of congratulations to the new President of the United States after winning the elections). [In another case](#), young people, who were under the influence of alcohol and celebrating the beginning of the holiday, shouted “f...k Duda”. They have just been brought to trial for this “gross insult”.

The crime of insulting the President of Poland is not new, and has not been introduced by PiS (Polish acronym for the Law and Justice Party). The provision under which the Public Prosecutor is prosecuting a writer and high school students had already been used in the past to prosecute people who expressed themselves unfavorably or using expletives about heads of the Polish state. Pursuant to Art. 135 of the penal code, anyone who publicly insults the President of the Republic of Poland is subject to imprisonment for up to 3 years. The protection of the dignity of a state organ can be justified in certain, extreme situations and a persistent, insulting, vulgar verbal attack on the office of the president should be met with a legal reaction. It is also worth pointing out that in July 2011, the [Polish Constitutional Tribunal ruled](#) that the provision is constitutional. However, neither in the case of Mr. #ulczyk nor in that of the high school students we are dealing with this type of disrespect – what we see instead is the hyperactivity of the Prosecutor’s Office seeking to silence voices critical of Andrzej Duda. At the same time, the politicization of the Prosecutor’s Office and the efforts of the government to subordinate common courts mean that fair trial guarantees in cases of such politically marked indictments can be called into question.

## History on trial

Another “battlefield” over freedom of speech is the ongoing lawsuits regarding the public narrative of historical events, largely due to the [legal governance of history in Poland](#). Of course, these cases are of a different nature and not all of them should be interpreted as silencing critical voices about Polish history and the crimes committed by Poles. However, each of them raises fundamental doubts as history enters the courtroom and judges take over the role of historians.

One of the most widely discussed cases is the [lawsuit against ZDF](#), in which the Krakow appellate court ruled last Tuesday that the producers of the series “Our mothers, our fathers” are to publish an apology on Polish and German television because they violated the personal rights of the World Union of Home Army Soldiers (Home Army is a name of Polish resistance force under German occupation 1939-1945). The judgment is final. In Poland, the production was criticized for showing Home Army partisans as anti-Semites and for minimizing the responsibility of the German Nazis. Although here a veteran of the Home Army was acting as a plaintiff, what is most worrying in this [type of cases](#) is the involvement of various organisations associated with the authorities in initiating this kind of “judgments over history”.

It is also worth mentioning that one aspect of the “history on trial” controversy has recently been dealt with by the CJEU. Answering the request for a preliminary ruling from the Court of Appeal in Warsaw, [Advocate General Bobek](#) analysed if the Polish courts have international jurisdiction to hear a claim by a Polish national, a former prisoner of Auschwitz, brought against a German newspaper for having used the expression “Polish extermination camp” in an online article. His conclusion that EU law on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters “must be interpreted as meaning that the establishment of the jurisdiction based on the centre of interests does not require that the allegedly harmful online content names a particular person”, if confirmed by the CJEU, will definitely encourage more and similar lawsuits being brought in Poland in defence of “national identity” and “national pride”.

## **SLAPPING critics**

The above examples indicate a clear trend towards the excessive limitation of free speech, exercised in a form of criticism or commentary to the reality that surrounds us in Poland. The most dangerous phenomenon, however, remains the massive campaign of launching so-called SLAPPs (Strategic Lawsuits against Public Participation) against government critics. Activists, media or even local community groups are sued for what has long been considered “ordinary” public participation. It is considered a misuse of the legal process since the true aim of the authorities, in the guise of plaintiffs, in SLAPP suits, is most often not to win the case (as the claims are often spurious and very weak) but to intimidate the defendant. They are able to eliminate even strong entities from public debate and to silence critics. As a consequence, they can influence the shape of the political scene or even the results of the elections.

There are no official or general statistics concerning the number of SLAPPs in Poland. However, some data are available. As noted in July 2020 by the [European Centre for Press and Media on Freedom](#), since 2015 “Gazeta Wyborcza” (the largest Polish newspaper, highly critical of the current Polish government) has received over 55 legal threats, including civil defamation actions for alleged infringements of personal rights by a number of entities including Jarosław Kaczyński, the head of PiS party; the state television broadcaster, Telewizja Polska SA, and state-owned company KGHM Polska Miedź SA. Each threat has appeared in relation to articles

published in the newspaper or on its website. However, the number of 55 should be now modified: just a few days ago the partners of the Media Freedom Rapid Response (MFRR) [issued a](#) statement in which they strongly condemned the civil defamation lawsuit launched against the editor-in-chief of Gazeta Wyborcza by the serving Justice Minister Zbigniew Ziobro. As claimed by MFRR: “Our organisations consider this to be yet another example of the Justice Ministry’s use of lawsuits as a tool for pressuring and financially draining the newspaper, which is one of the staunchest critics of the ruling Law and Justice (PiS)”.

SLAPPs in Poland are also used against public commentators. In 2018, Professor Wojciech Sadurski published a tweet characterizing PiS as “an organized criminal group”. The tweet called upon citizens to boycott a so-called “Independence March” to be held in Warsaw. He had been [sued by PiS](#) claiming that the “personal rights” of the party have been violated. The nature and “essence” of this SLAPP is well manifested in the plaintiff’s demands, thus they are worth indicating in length:

- A public apology was demanded, the text of which reads: “I apologize to the political party Prawo i Sprawiedliwość## for unlawfully calling it an organized criminal group on 28 November on Twitter. I declare that there were no grounds for formulating such a description. I regret that, as a result of my unlawful actions I have groundlessly breached the good name of the Law and Justice Party”. The apology was to be placed on Twitter, as a pinned tweet, for 14 days;
- an injunction restraining the defendant from making any future statements which imply that the activities of the party PiS may be in any way compared to any criminal activities;
- payment of PLN 20.000 [approx. EUR 5.000] to a nominated charity;
- payment of all legal costs and costs of legal representation.

On November 6, 2020, The Court of Appeal in Warsaw dismissed the appeal and thus upheld the judgment of the District Court dismissing the lawsuit against Sadurski. The decision is final. The Court of Appeal confirmed that comparing the modus operandi of PiS to the functioning of an organized criminal group was a metaphor and is within the bounds of permitted criticism. Unsurprisingly, PiS has already announced it will seek the cassation of the judgment by the Supreme Court.

## Illusion and allusion

In the last years, Verfassungsblog has offered [a forum](#) to present increasingly disturbing accounts on how a democratic state goes further and further in violating the rule of law and constitutional order, as well as in disrespecting rights and freedoms. Some of these developments do not stir up public opinion, perhaps due to the (illusory) belief that they do not directly concern “ordinary citizens”. However, when it comes to violating one of the most fundamental rights and freedoms of an individual – freedom of expression – we should all, uncompromisingly, stand up to defend it.

In the times of populisms and authoritarian attempts, freedom of expression remains one of the last (self)defense instruments available to pro-democratic civil society.

The freedom of the press plays a vital, key role in this respect. Also academic freedom and the freedom to take part in public debate are necessary conditions for every democracy to exist. This freedom is not absolute and for decades national and international courts have developed standards concerning its limits. However, what is currently happening in Poland raises serious doubts as to whether these standards have or will continue to have any significance. Some of the examples of this trend do not pose a deadly threat to freedom of expression, while others may clearly affect the very essence of that freedom.

Looking for a concluding remark for this entry on free speech under pressure in Poland I thought about the way this freedom has recently been exercised by Professor Przemysław Czarnek, the Polish Minister of Education and Science. He referred to the over 700-pages long academic publication on the fate of Jews during WWII in Poland, that was published as a result of 6 years of research, as [antypolski szmatławiec](#). The word “szmatławiec” is difficult to translate. If we are to offer a direct translation, the Minister called this academic book an “anti-Polish rag”. However, another translation is of more relevance here. The [online Dictionary of the Polish Scientific Publishers](#) explains:

1. contemptuously: “worthless newspaper”
2. contemptuously: “during the Nazi occupation: the press organ of the occupant”.

As Minister Czarnek explained, this kind of anti-Polish research will no longer be financed by public funds.

